

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

BECKLEY DIVISION

MICHAEL ALLEN KOKOSKI,

Movant,

v.

CIVIL ACTION NO. 5:02-0079
(CRIMINAL ACTION NO. 5:96-0064)

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OPINION AND ORDER

Pending is the motion by Michael Allen Kokoski for a certificate of appealability . For the following reasons, the motion is **DENIED**.

Pursuant to 28 U.S.C. § 2253(c) and Rule 22(b) of the Federal Rules of Appellate Procedure, an appeal may not be taken from the final order in a habeas corpus proceeding under 28 U.S.C. § 2255 unless a district judge issues a certificate of appealability. The district court may issue the certificate “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). A prisoner may meet this standard by establishing “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’ ” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)(quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, n. 4 (1983)). *See also Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001).

The petitioner has failed to meet this standard. As noted in the magistrate judge’s proposed findings and recommendation and in this court’s orders adopting those findings and denying the

petitioner's motion to reconsider, the petitioner's claims have no merit. The claims essentially fall into two categories. First, the petitioner raises factual issues from an earlier prosecution that are irrelevant to this case. Those claims were fully considered by the district court in the earlier case, in which the Fourth Circuit denied a certificate of appealability and the Supreme Court denied certiorari. Second, the petitioner raises issues regarding sentencing errors that were not raised on direct appeal and for which no relief is warranted. The petitioner contends that he is entitled to resentencing under *Blakely v. Washington*, 124 S.Ct. 2531 (2004), and *United States v. Booker*, 125 S.Ct. 738 (2005). The basis for this claim is that his sentence was increased because of his status as a career offender even though that status was not charged in the indictment nor found by a jury. Because the *Blakely* line of cases applies a "prior conviction" exception, those cases present no basis for resentencing here.

Accordingly, the request for a certificate of appealability is **DENIED**. Pursuant to Fed. R.App. P. 22(b)(1), the petitioner may ask a circuit judge of the United States Court of Appeals for the Fourth Circuit to issue the certificate.

The Court **DIRECTS** the Clerk to send a copy of this written opinion and order to counsel of record and the movant, who is acting *pro se*.

ENTER: June 24, 2005

A handwritten signature in black ink, appearing to read 'Robert C. Chambers', written over a horizontal line.

ROBERT C. CHAMBERS
UNITED STATES DISTRICT JUDGE